



DEPARTMENT OF LAW
OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

75-345
BRUCE E. BABBITT
ATTORNEY GENERAL

R75-513

September 24, 1975

Mr. John R. McFarland
Acting Director
Department of Corrections
1601 West Jefferson
Phoenix, Arizona 85007

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ARIZONA ATTORNEY GENERAL

Dear Mr. McFarland:

Your letter of August 18, 1975 requests an opinion regarding the legal implications of the Department of Corrections obtaining and converting one of the buildings at the Arizona State Hospital to a Women's Prison. Attached to your letter is a Memorandum prepared by a staff member of the Department of Health Services which presents several alternative methods whereby a State Hospital building might be acquired by your Department and concludes that the only feasible means would be through a short-term lease. In essence, we would agree with this conclusion and, therefore, herein address ourselves to the following question:

Under what circumstances might the Department of Corrections and the Director of the Department of Health Services, as trustee of the State Hospital property which is held in trust for the use and benefit of the mentally ill persons of the State, enter into an agreement whereby the Department of Corrections acquires a leasehold interest in a portion of the trust property?

The real property used by the Arizona State Hospital at 2500 East Van Buren, Phoenix, hereinafter referred to as the "trust property", was deeded in 1885 to the Board of Directors of the Insane Asylum of Arizona (a predecessor of the Department of Health Services) for the use and benefit of the Territory of Arizona (predecessor of the State of



Arizona) and for said Asylum (now referred to as the State Hospital).

The Arizona Supreme Court held in State v. Coerver, 100 Ariz. 135, 412 P.2d 259 (1966), that the conveyance established a charitable trust and that the beneficiaries are the mentally ill of the State. The Court said:

' . . . the Directors and their successors may receive and hold such [trust] property for the benefit of the Territory of Arizona and the use of said Asylum.' Certainly these phrases suggest an intention to create a charitable trust with the Board of Directors of the Insane Asylum as trustees, and the beneficiaries being the mentally ill of the State. 100 Ariz at 142.

The Legislature, in Ch. 149, Laws 1973, established the Department of Health Services and provided for the transfer of several health related agencies, including the Arizona State Hospital, to the new Department. This act also abolished the State Hospital Board and substituted for all references thereto the word "Director".

A.R.S. § 36-103.01, Governmental units succeeded; statutory references to succeeded governmental units, in pertinent part provides:

A. The department [of health services] succeeds to the authority, powers and duties and responsibilities of the following:

4. Arizona State Hospital.

A.R.S. § 36-136, Powers and duties of director; compensation of personnel, in pertinent part provides:

A. The director, [of the department of health services] shall:

1. Be the executive officer of the department of health services and the state registrar of vital statistics but shall receive no compensation for his services as registrar.

2. Perform all duties necessary to carry out the functions and responsibilities of the department.

. . .

A.R.S. § 36-204, Powers and duties of director, state hospital fund, in pertinent part provides:

. . .

B. The director may accept and expend gifts and grants on behalf of the state hospital and shall account for them. The director shall maintain a separate permanent fund in the state treasury to be known as the state hospital fund. Monies received from gifts and grants from any person or by law as a gift or grant shall be deposited in the state hospital fund and shall constitute a trust fund to be administered by the director in conformity with the conditions prescribed by the donor or grantor.

These statutes, together with the decision reached in Coerver, supra, clearly establish the Director of the Department of Health as the successor to the State Hospital Board, as trustee of the trust property as well as the person having overall responsibility for the operations of the Department, including the State Hospital. In this dual capacity, the Director must observe the fiduciary responsibilities of trustee as well as the legal responsibilities inherent in the public office. As trustee the Director has the duty to assure that the trust property is devoted to the purpose for which the trust was established. See Scott on Trusts, § 379 (3rd ed. 1967). The manner in which such purpose is best achieved is ordinarily within the reasonable discretion of the trustee, except that where the propriety of the action to be taken is in doubt, the trustee is well advised to seek prior Court approval.

The trustee has a duty to make the trust property productive. See Scott, § 181 infra. In the case at hand, if a portion of the trust property is temporarily unusable or unneeded for State Hospital purposes and might be leased to the Department of Corrections in a manner which would not be detrimental to the continued use of the remainder of the trust property for the purpose of the trust, the Director may enter into such lease provided:

1. that the amount of the rental reasonably reflects the value of the property leased;
2. that the income is separately accounted for and devoted to the purpose of the trust;
3. that there be included a statement that the Director acknowledges that Cholla Hall is not now in use and is therefore serving no purpose of benefit to the "mentally ill of the State", and that the Director anticipates no such use or benefit during the term of the lease, but that the Director reserves the right to terminate the lease on reasonable notice in the event the use of the leased portion becomes needed for State Hospital purposes;
4. that the use of the building by the lessee will not reduce its utility for State Hospital purposes upon termination of the lease.

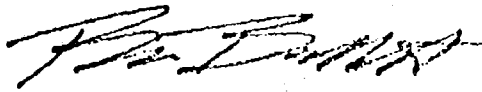
Assuming that the Director, as trustee, believes that the purposes of the trust can best be achieved by temporarily devoting an unused and unneeded portion of the trust property to an income-producing trust asset, we believe that a lease agreement might be negotiated within the framework set out above and the provisions of A.R.S. §§ 11-951, et seq., relating to interagency agreements.

If discussions between your agency and the Director of the Department of Health Services indicate that lease of

Mr. John R. McFarland
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a portion of the trust property as described above is
viable, we will be glad to further assist in this
matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Bruce E. Babbitt", with a stylized flourish at the end.

BRUCE E. BABBITT
Attorney General

BEB:WJW:bat